PEGGY MAVIS MOREIRA & ANOR

v.

MANIVAIL RAMASAMY

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
MOKHTAR SIDIN JCA
DENIS ONG JCA
[CIVIL APPEAL NO: A-02-170-1998]
31 MARCH 2001

CIVIL PROCEDURE: *Appeal - Notice of - Whether defective - Solicitors filing notice of appeal purporting to represent 1st and 2nd defendants - Memorandum of appeal states only 2nd defendant was being represented - Whether appeal properly before court*

This was the defendants' appeal against the decision of the High Court ordering specific performance of an agreement by which the plaintiff was to purchase some land and a house from the 1st defendant. The issue that arose for decision here was whether the appeal was properly before the Court of Appeal.

Held:
Per Shaik Daud Ismail JCA

[1] In filing the notice of appeal Messrs Blanche Kayveas purported to represent both the 1st and 2nd defendants. However, in filing the memorandum of appeal it claimed to represent only the 2nd defendant. There was uncontroverted evidence that the 1st defendant had never retained Messrs Blanche Kayveas to act for her. Consequently, the notice of appeal filed by Messrs Blanche Kayveas was defective as it had no authority to represent the 1st defendant. The appeal was, therefore, not properly before the Court of Appeal.

[Appeal struck out.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan defendan terhadap keputusan Mahkamah Tinggi yang memerintahkan pelaksanaan spesifik sesuatu perjanjian melalui yang mana plaintif seharusnya membeli sesebuah tanah dan sebuah rumah daripada defendan pertama. Isu yang berbangkit di sini adalah samada rayuan tersebut telah dikemukakan mengikut aturan di hadapan Mahkamah Rayuan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Dalam memfailkan notis rayuan Tetuan Blanche Kayveas bermaksud untuk mewakili kedua-duanya defendan pertama dan kedua. Walaubagaimanapun, ketika memfailkan memorandum rayuan ianya menuntut bahawa ianya hanya mewakili defendan kedua. Terdapat keterangan yang tidak boleh diperbalahkan bahawa defendan pertama tidak pernah mengambil Tetuan Blanche Kayveas untuk bertindak bagi pihaknya. Akibatnya, notis rayuan yang telah difailkan oleh Tetuan Blanche Kayveas adalah tidak sempurna kerana ianya tidak mempunyai kuasa untuk mewakili defendan pertama. Rayuan tersebut telah dengan itu, tidak dikemukakan mengikut aturan di hadapan Mahkamah Rayuan.

[Rayuan di batalkan.]

Legislation referred to:
Rules of the High Court 1980, O. 64 r. 1

For the appellants/defendants - Datuk Kayveas (PC Low with him); M/s Blanche Kayveas & Co
For the respondent/plaintiff - V Vijaya Segaran; M/s Maxwell Kenion Cowdy & Jones

[Appeal from High Court, Ipoh; Civil Suit No: 22-199-90]

Reported by Gan Peng Chiang

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the High Court which had on 13 March 1998 allowed specific performance of an agreement between the appellant and the respondent.

Briefly the facts are that the respondent and the 1st appellant had entered into an agreement dated 5 September 1990 whereby the respondent agreed to purchase a property held under C.T. No. 5937 for Lot No. 204 and a Lease of State Land No. 598 for Lot 206 both in the Mukim of Ringlet in the District of Cameron Highland, Pahang, together with a bungalow house erected thereon from the appellant. The respondent paid a sum of RM80,000 to the solicitors of the 1st appellant as part payment towards a purchase price of RM160,000. The 1st appellant was alleged to have breached the said agreement by refusing to execute the transfer and by returning the sum of RM80,000. The respondent filed a writ of summons against the appellant seeking *inter alia* specific performance of the agreement and alternatively damages for breach of the agreement and costs. The 2nd appellant was added as a party to the suit following an application to intervene *vide* order dated 4 January 1991.

The respondent however, filed a notice of motion seeking an order that the appeal be struck out on the grounds as set out in a supporting affidavit sworn by the respondent himself. He deposed that in the High Court the plaintiff (the present respondent) was represented by Messrs. Maxwell Kenion Cowdy & Jones. The 1st defendant (the present 1st appellant) was represented by Messrs. Xavier Norhaslinda & Associates while the 2nd defendant (the present 2nd appellant) was represented by Blanche Kayveas & Co. After the High Court handed down its decision by ordering specific performance of the agreement, notice of appeal was filed by Messrs. Blanche Kayveas & Co. purportedly on behalf of both the appellants. Incidentally the notice of appeal too gave the wrong date of the High Court order which should be 13 March 1998 instead of 12 March 1998. The significant issue is that the notice of appeal filed by Messrs. Blanche Kayveas & Co. was for both the appellants, when as earlier stated Messrs. Blanche Kayveas & Co. only represented the 2nd appellant and not the 1st appellant. This was followed by filing of the memorandum of appeal which now states that the 2nd appellant is the only one appealing against the decision of 13 March 1998 and is represented by Messrs. Blanche Kayveas & Co. No mention is made of the position of the counter-claim by the 2nd appellant which was also dismissed by the High Court. Therefore in filing this notice of appeal, Messrs. Blanche Kayveas purported to represent both the appellants but in filing memorandum of appeal, they purported to represent only the 2nd appellant. This error, if it was an error, was pointed out to Messrs. Blanche Kayveas & Co. by a letter dated 27 March 1998 from the solicitors for the 1st appellant but no effort was made to have it rectified. There is in fact uncontroverted evidence that the 1st appellant never in the first place, retained Messrs. Blanche Kayveas to act for her nor did she instruct them to appeal against 13 March 1998 decision. To this effect a letter dated 7 April 2000 was sent by her solicitors to Messrs. Blanche Kayveas & Co. and another letter of the same date to the registrar of the Court of Appeal. This was further confirmed by an affidavit of the 1st appellant affirmed on 18 July 2000. In spite of all these, no effort was taken by Messrs. Blanche Kayveas to rectify this. Therefore, it is clear that the initial notice of appeal filed by Messrs. Blanche Kayveas & Co. is defective as they had no authority to represent the 1st appellant when they filed the notice of appeal. The 2nd appellant's case rested entirely on his counter-claim which was dismissed but the 2nd appellant had not appealed against that dismissal. Dato' Kayveas while conceding that his firm never represented the 1st appellant from the beginning cited O. 64 r. 1 of the Rules of the High Court 1980, which provides thus:

(1) A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, unless and until notice of the change is filed and served in accordance with this rule, the former solicitor shall, subject to rules 4 and 5, be considered the solicitor of the party until the final conclusion of the cause or matter, in the High Court.

With respect we think that this rule, in no way assists him as he has in fact conceded that he never represented the 1st appellant (who was the 1st defendant in the High Court) from the beginning.

For these reasons we hold that the notice of appeal is defective and therefore the appeal is not properly before us. We strike out the appeal with costs to the respondent against the 2nd appellant only and order the deposit to go towards the account of costs.